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No. 86-339

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

NATIONAL GYPSUM COMPANY,
UNITED STATES GYPSUM COMPANY, AND
W.R. GRACE & CO,
Petitioners

v.

SCHOOL DISTRICT OF LANCASTER, ET AL,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INTRODUCTION

All representatives of a plaintiff class of approximately 14,000 public and private school districts in the United States oppose the granting of a writ of certiorari in this case. The only parties seeking certiorari for the Third Circuit's vacation of a Rule 23(b)(1)(B) class for punitive damages claims of school asbestos claimants, and its affirmance of the district court's denial of a Rule 23(b)(2) class for declaratory relief are three of fifty defendants. Indeed, not a single litigant, save these three defendants, seeks these classes at this time.

Class representatives are school districts in Pennsylvania and South Carolina, Tennessee, and California, who filed these consolidated class actions in the United States District Court for the Eastern District of Pennsylvania, on January 17, 1983, March 23, 1983 and May 11, 1984. Defendants are businesses engaged in the asbestos industry as miners, suppliers, contractors, manufacturers or distributors of asbestos or asbestos-containing products. Plaintiffs claim that defendants are responsible for the presence of friable (i.e. easily crumbled) asbestos in their school buildings, and seek compensatory damages for the cost of its removal or other abatement and punitive damages. Defendants' liability is predicated entirely on the law of the several states, including such theories of liability as negligence, strict liability, breach of warrant and conspiracy.

The District Court certified two classes: (1) a Rule 23(b) (3) class, with opt out rights, of all public and private elementary and secondary schools and school districts in the United States, respecting claims for compensatory damages, and (2) a no-opt-out "mandatory" class under Rule 23(b)(1)(B) of the same schools and school districts respecting claims for punitive damages. It based certification of the mandatory class solely on its belief that there was a "substantial possibility that early awards of punitive damages in individual cases . . .

[would] . . . impair or impede the ability of the future claimants to obtain punitive damages." *In re Asbestos School Litigation,* 104 F.R.D. 422, 437 (E.D. Pa. 1984), A-77.* This belief stemmed from a legal theory espoused by petitioners of "limited generosity," namely that even without a limited fund of assets, the fund might be limited through court-imposed limitations on the right of class members to recover punitive damages from defendants because earlier recovering schools might have punished them enough by their punitive damage recoveries through separate litigation. Class certification under Rule 23(b)(2) for abatement, monitoring and medical surveillance claims was denied on the ground that the relief sought was basically monetary, and not injunctive in nature.

Interlocutory appeals were taken from the order of the district court dated September 28, 1984 (Pretrial Order No. 20), A-52 containing all these class certification rulings. The Court of Appeals affirmed the certification of the (b)(3) compensatory damages class and the denial of the (b)(2) class, but vacated the certification of the punitive damages class under (b)(1)(B).

No issue of constitutional law, of federal law, or of the construction of Rule 23 was reached by the Third Circuit in any of its rulings. Instead, it vacated the certification of the (b)(1)(B) "mandatory" class on two purely factual grounds: first, it held that the district court's factual finding on the potential amount and scope of punitive damages was inadequate; 789 F.2d at 1005, A-28; second, it concluded that the class certified was under-inclusive of all existing and potentially affected property and personal injury asbestos claimants against defendants and that certification of a mandatory class would not and could not accomplish equality of treatment for all such claimants. The Third Circuit said that even if it were to remand the (b)(1)(B) certification for

* Refers to Appendix for Petition for Certiorari by Petitioners.

the development of a record on the possibility of there being a limited fund or other obstacle to all class members being afforded an equal opportunity to a punitive damages award, it was clear that other actions by other persons and entities not within the school board class who would be seeking punitive damages from the same potential fund would go forward in any event. The Court of Appeals reasoned that Rule 23(b)(1)(B) —

> exists to protect potential claimants and provide equality of treatment. Certification of a punitive damages class under the provision will not accomplish these objectives. In the court's pursuit of an end that is not attainable, the class designed to be protected will be burdened with hardships not imposed on any other litigants.
>
> 789 F.2d at 1006, A-29.

Thus the Third Circuit simply concluded that, under the unique circumstances of the massive asbestos litigation, when only a relatively small number of potential litigants would be included in the "mandatory" class, a class action under Rule 23(b)(1)(B) could not be sustained. The Court of Appeals clearly did not even reach, let alone decide, either the putative due process issue advanced by petitioners — whether the Constitution prohibits successive punishment of one defendant for one action that injures many victims, — or the issue whether the Anti-Injunction Act, 28 U.S.C. §2283, was violated by the certification of the "mandatory" (b)(1)(B) class. Given the factual bases for the Third Circuit's ruling on the (b)(1)(B) class, a decision on these issues clearly would have been hypothetical and, therefore, unnecessary. Accordingly, the Court below properly chose not to speak to these issues.

In addition, the Third Circuit refused to disturb the District Court's denial of class certification under Rule

23(b)(2) based on its discretionary finding that the instant school asbestos claimants are primarily seeking monetary relief. 789 F.2d at 1008, A-32-33. Thus, here again, the court never reached the question on which the petitioners ask this Court for an advisory opinion.

The affirmance of the (b)(3) class is not at issue in the present petition.

I. NO SPECIAL OR IMPORTANT REASON EXISTS FOR REVIEW BY THIS COURT OF THE THIRD CIRCUIT'S DECISION ON INTERLOCUTORY CLASS RULINGS, NOR IS THERE ANY CONFLICT AMONG CIRCUITS ARISING FROM PETITIONERS' HYPOTHETICAL QUESTIONS PRESENED FOR REVIEW.

A. THE QUESTION—WHETHER DUE PROCESS REQUIRES AN AGGREGATE LIMIT ON MULTIPLE PUNITIVE DAMAGES IN MASS TORT CASES—WAS NOT DECIDED BELOW, AND IN ANY EVENT PRESENTS NO CONFLICT AMONG THE CIRCUITS.

Petitioners argue that the Third Circuit's vacation of the Rule 23(b)(1)(B) class placed at issue the question whether there is any due process limit on the aggregate amount of punitive damages that may be awarded against a defendant in successive judgments arising from the same act or series of acts. This is so, they reason, because the (b)(1)(B) class protected their right to be free of unlimited punishment. In seeking certiorari, they request this Court to establish that (b)(1)(B) may be used to enforce such an aggregate limit and to rectify the putative conflict over the issue in the Courts of Appeals.

Petitioners' reasoning is flawed because no Court of Appeals, including the Third Circuit, has held that defendants have a due process right to an aggregate

limit on punitive damages.[1] Certainly this issue was not decided by the Third Circuit in its ruling in this case.

Petitioners' clever briefing cannot conceal the fact that the mandatory class certified by the district court in *this* case was "critically flawed" because of its vast under-inclusiveness. Nor can it conceal the fact that this under-inclusiveness and the lack of a factual record support or findings for the "limited generosity" theory were the sole bases for the Third Circuit's decision to vacate the certification of the (b)(1)(B) class. The Third Circuit's parenthetical dictum on the possible merits of a due process/punitive damages class under Rule 23(b)(1)(B) under different circumstances, played no role in its ruling. It follows that nothing in the Third Circuit's decision implicates either the Constitution, federal law, or the interpretation of Fed.R.Civ.P. 23.

This conclusion is made plain by the language of the Court itself:

> We conclude that the mandatory class cannot be approved because of a lack of necessary findings and

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1. To the contrary, courts of appeals that have considered the question of a (b)(1)(B) class in the context of a mass tort suit all have made their inquiries from the point of view of the plaintiffs' rights, not the defendants'. This is so whether a court has considered the impact of a limited fund in terms of the plaintiff class' right to equal access to any punitive damage award, *In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858, 861-62 (2d Cir.) *cert. denied* 104 S.Ct. 1417 (1984); the effect on a plaintiff class of state law-imposed restraints on repetitive punitive damages awards, *In re School Asbestos Litig.*, 789 F.2d 996, 1004 (3d Cir. 1986); or the necessity of a factual record demonstrating the risk that early-filing claimants to a limited fund will lessen the potential for recovery of those claimants who file later. *Bendectin Products Liability Litigation*, 749 F.2d 300 (6th Cir. 1985) *In re Northern District of Cal. Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847, 852 (9th Cir. 1982), *cert. denied* 459 U.S. 1171 (1983). In these inquiries, *it is the rights of the plaintiff class that are at issue*. There is no conflict among the circuits on this point. The issue of defendants' rights to determination of an aggregate limit to punitive damages is an entirely different question and is totally hypothetical in this case.

> for the additional reason that the class, being underinclusive, cannot in the circumstances here accomplish the objectives for which it was created.
> 789 F.2d at 998, A-11

The Court explained its ruling specifically that:

> The district court made no factual findings at all as to the potential amount and scope of punitive damages. This is in sharp contrast to the detailed findings on the subject in *In re Agent Orange Product Liability Litigation*, 100 F.R.D. 718 (E.D. N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir.), *cert. denied*, 104 S.Ct. 1417 (1984).
>
> * * *
>
> Assuming that the record supported the "limited generosity" theory, we would nonetheless decertify the class on the ground that it is underinclusive.
> 789 F. 2d at 1005, A-25-26

Thus, two purely factual matters underlay the Third Circuit's ruling on the (b) (1) (B) class.

The Third Circuit's language stands out all the more clearly in view of its recognition that there might be arguments for the proposition that, as a matter of Constitutional law, the courts should shoulder some responsibility for preventing successive punitive damage awards for the same acts. 789 F.2d at 1005, A-25. Specifically the Court

> assumed[d] *without deciding*, that these arguments might provide a threshold for the exercise of discretion in certifying a nationwide (mandatory) Rule 23(b) (1) (B) class for punitive damages. *We nonetheless hold that the district court abused its discretion* in certifying the 23(b) (1) (B) class here because neither the record nor the court's findings are adequate to support the procedure. (Emphasis added)

Clearly, the court below chose not to decide any constitutional or federal law questions at this stage of the litigation, nor to interpret Rule 23 in any way other than to observe its basic objectives, about which there is no dispute. Having made its wishes vividly clear, there is now no issue for review by this Court.

Nor is there any basis to argue that the Third Circuit's ruling conflicts with any other Circuits on these points. On the contrary, the court below expressly held open the possibility of a (b) (1) (B) punitive damages class in more appropriate circumstances, 789 F.2d at 1008, A-32, citing *In re Bendectin Products Liability Litigation*, 749 F.2d 300 (6th Cir. 1984) and *In re Northern District of California Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

B. THE PROPER STANDARD TO SUPPORT A RULE 23(b) (1) (B) CLASS CERTIFICATION FOR PUNITIVE DAMAGE CLAIMS WAS NOT DECIDED BELOW, AND, IN ANY EVENT, PRESENTS NO CONFLICT AMONG THE CIRCUITS.

Petitioners argue that the Third Circuit erroneously vacated the (b) (1) (B) "mandatory" class for punitive damages and that its ruling perpetuates confusion among the Circuits concerning the proper standard to support a (b) (1) (B) class in the context of mass tort suits. They seek review by this Court to resolve that perceived confusion by "establishing that Rule 23(b) (1) (B) can be used to protect due process rights when hundreds of plaintiffs seek punitive damages for the same act or series of acts and thereby provide equal access to all claimants to any awards of punitive damages." Petition for Certiorari, 17-18.

Petitioners' boldness in seeking an advisory opinion on this issue that was never decided below, serves only to delay the proceedings and unduly burden the parties

and this Court. As demonstrated, the Third Circuit's decision was based entirely on factual considerations.

Because the Third Circuit, did not rule on the proper standard to support a (b) (1) (B) class for punitive damages, the decision below is not in conflict with any other Court of Appeals.[2] If anything, its approving references to the rulings of those other Circuits, *In re Bendectin, Dalkon Shield, supra,* holding open the possibility of a Rule 23(b) (1) (B) class for punitive damages "in more appropriate circumstances" negate the existence of any conflict.

C. THE QUESTION, — WHETHER A DISTRICT COURT EVER MAY CERTIFY A NATIONWIDE RULE 23(b) (1) (B) CLASS FOR PUNITIVE DAMAGES — CANNOT BE IN CONFLICT WITH OTHER CIRCUITS BECAUSE THE THIRD CIRCUIT LEFT OPEN THIS QUESTION, AS DID THOSE COURTS.

The decision below compared the relatively modest elementary and secondary school class in this litigation to the universe of potential punitive damage claimants against the asbestos companies. In vacating the Rule 23(b) (1) (B) school class for punitive damages the Third Circuit noted that. . . " . . ."Rule 23(b) (1) (B) exists to protect potential claimants and provide equality of treatment" whereas the effect of certification in this case of

2. Petitioners attempt to demonstrate a disparity between the various Circuits' interpretation of Rule 23(b) (1) (B) with respect to the standard necessary to invoke that provision, and that the Third Circuit's decision somehow was engendered "confusion" on this point. Petition at 17. However, the Third Circuit's decision did not discuss the question of the proper standard under this provision; it referred to the absence of any factual findings to which *any* standard could be applied. *See* 789 F.2d at 1005. Thus, this case does not raise the issue of the proper standard to be applied under Rule 23(b) (1) (B).

an under-inclusive "mandatory" class "has been to single out the school districts for special and possibly disadvantageous treatment." 789 F.2d at 1006, A-29.

The Court of Appeals did not decide any constitutional or statutory limitations on the use of a nationwide class for mass tort litigation under Rule 23(b) (1) (B). On the contrary, the court recognized: "Whether a national class based on a constitutional challenge could accomplish that result [of overcoming the problem of under-inclusiveness of the class] is obviously not before us." 789 F.2d at 1006, A-29-30. The court expressly left open the question whether an under-inclusive class ever can be properly certified under Rule 23(b) (1) (B) under different circumstances, and the court did not address the issue whether a nationwide Rule 23(b) (1) (B) class for punitive damages ever may be certified:

> We do not hold that under-inclusiveness is necessarily fatal to a class created under 23(b) (1) (B);[10] rather, each case requires a careful assessment of the factors mentioned in Rule 19. Courts should give particular attention to the possibility of prejudice either to those omitted from the class or to those within it. In the circumstances here, we conclude that under-inclusiveness does pose such an obstacle.
>
> [Footnote]
>
> 10. We obviously do not reach the question whether the notion of under-inclusiveness applies outside of a 23(b) (1) (B) mandatory class action.
>
> 789 F.2d at 1007, A-30

Under these circumstances, the question whether constitutional or statutory limitations prohibit the certification of a Rule 23(b) (1) (B) nationwide class for punitive damages is purely hypothetical in this case, and raises no issue or special reason for review by this Court or any conflict among the circuits.

D. THE QUESTION — WHETHER CLASS CERTIFICATION FOR A DECLARATORY JUDGMENT LIMITED TO SELECTED COMMON QUESTIONS IN MASS TORT PRODUCT LIABILITY LITIGATION IS PROPER UNDER RULES 23(b) (2) and (c) (4) (A) — WAS NOT DECIDED BELOW AND PRESENTS NO CONFLICT AMONG THE CIRCUITS.

The Third Circuit affirmed the District Court's denial of a school asbestos class under Rule 23(b) (2). After reciting the procedural background of this ruling, the Third Circuit affirmed that denial in two brief paragraphs:

> Precedent supports the district court's view that an action for money damages may not be maintained as a 23(b) (2) class action. (citations omitted) We see no justification for overturning the district judge's evaluation of the realities of the litigation before him. Counsel's desire to have a mandatory class is understandable, but the case for such a certification has not been established.
>
> We find neither error of law nor abuse of discretion in the judge's ruling, and consequently will affirm the denial of a (b) (2) class.
>
> 789 F.2d at 1008, A-33

Because the Circuit Court held that this case did not fall within Rule(b) (2), it never reached the question of certifying selected common issues or whether there were common issues that might be suitable for 23(b) (2) class treatment. In light of the Third Circuit's summary ruling that 23(b) (2) is inapplicable, Petitioners' question presented for review by this Court — whether class certification for declaratory judgment limited to selected common questions in mass tort product liability is proper under Rule 23(b) (2) and (c) (4) (A) — is purely hypothetical and does not raise any issue in conflict with other circuits.

II. THE THIRD CIRCUIT'S OPINION ON INTERLOCUTORY AND CONDITIONAL CLASS CERTIFICATION RULINGS MAKES ANY SUPREME COURT REVIEW ENTIRELY PREMATURE AT THIS TIME, PARTICULARLY WHEN, AS HERE, THE FIRST PUNITIVE DAMAGE AWARD TO ANY SCHOOL DISTRICT AGAINST ANY DEFENDANT HAS YET TO BE MADE.

Even if the Third Circuit had chosen to express its views on the due process rights of petitioners, any Supreme Court review of that ruling would have been entirely premature. As this Court has held, it does not decide abstract, hypothetical or contingent questions, or constitutional questions before they need be decided. *Thorpe v. Housing Authority of City of Durham, N.C.*, 383 U.S. 268, 284, 89 S.Ct. 518, 527, 21 L.Ed.2d 474 (1969) *quoting Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461, 65 S.Ct. 1384, 1389, 89 L.Ed. 1725 (1945); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L.Ed. 897 (1955) (Supreme Court "does not sit to satisfy a scholarly interest" in "intellectually interesting and solid problems," nor "for the benefit of the particular litigants. . . Special and important reasons' imply a reach to a problem beyond the academic or the episodic."). Yet, that is precisely what petitioners seek from this Court. Plainly, the Third Circuit's opinion, rendered prior to final judgment, addressed the district court's class rulings which by virtue of Rule 23(c) (1), are themselves interlocutory and conditional.[3] At any time prior to a decision on the merits, the district court may alter or amend its

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3. Trial Court decisions on class certifications are "inherently tentative." *See, Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978); *Moses S. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, n. 14, 103 S.Ct. 927, 935 n. 14, 74 L.Ed.2d 765 (1983)

class rulings.[4]

In addition to the interlocutory and conditional nature of the rulings involved, review certainly would be premature when, as here, the first punitive damage award to any school district against any defendant herein has yet to be made. Thus, not only is the claimed due process right not to be burdened with successive punitive damages awards arising out of the same action a hypothetical right not ruled upon by the Third Circuit, conditionally or otherwise, but no defendant actually has been threatened by the loss of such an asserted right in any school asbestos case to date.[5] In light of the purely speculative nature of petitioners' contention, no review by this Court is now necessary.

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4. See, Wright, Miller & Kane, *Federal Practice & Procedure*, Civil 2d §1785. (1986); 2 H. Newberg, *Newberg On Class Actions*, §§7.33, 7.47 (2d Ed. 1985)

5. Last term, this Court denied certiorari in two fully matured cases which held that successive awards of punitive damages in asbestos personal injury cases arising from one act of defendant do not violate due process. *See, Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1570 (6th Cir. 1985), *cert. denied*, 106 S.Ct. 3335 (1986) (trial court's review of jury verdict satisfies due process; punitive damages "overkill" is not "basis for denying otherwise proper punitive damages recovery", *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985) (*en banc*), *cert . denied*, 106 S.Ct. 3339 (1986); Accord: *Martin v. Johns-Manville Sales Corp.*, 508 Pa. 154, 494 A.2d 1088, 1099 (Pa. 1985) (requirement that punitive damages award bear some reasonable relationship to compensatory damages awarded protects defendants); *Lemer v. Boise Cascade, Inc.*, 107 Cal.App.3d 1, 165 Cal.Rptr. 555 (Cal.App. 1980) (award of punitive damages to one plaintiff no bar to later award of punitive damages to another plaintiff for the same act of defendant); *State ex rel. Young v. Crookham*, 290 Ore. 61, 618 P.2d 268 (Ore. 1980) (court rejected "one bite/first comer" approach to punitive damages).

CONCLUSION

None of Petitioners' Questions Presented for Review in their Petition for Certiorari was addressed by the Third Circuit's opinion in this case. They are all hypothetical, reflecting petitioners' desire to maintain a "mandatory" nationwide class in these school asbestos property damage cases. But this Court wisely does not issue advisory opinions on issues not decided below, and the Petition for Certiorari by National Gypsum Company et al. should be summarily denied.

Respectfully submitted,

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